FILED
MAY 12 2005
OFFICE OF THE CLERK

No. 04-1045

IN THE

Supreme Court of the United States

NEWSPAPER ASSOCIATION OF AMERICA, BELO CORP., GANNETT CO., INC., and MORRIS COMMUNICATIONS COMPANY, LLC,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

RICHARD E. WILEY
Counsel of Record
JAMES R. BAYES
HELGI C. WALKER
MARTHA E. HELLER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Newspaper Association of America, Belo Corp., Gannett, Co., Inc., and Morris Communications Company, LLC

May 12, 2005

194406

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT

The joint corporate disclosure statement for the Petitioners was set forth on pages iii and iv of the Petition, and there are no changes to that statement.

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
ARGUMENT	
I. Review By This Court Is Necessary To Provide Clear And Definitive Guidance On The Correct Statutory And Constitutional Framework For Agency Action And Prevent Unnecessary Delay and Further Error On Remand	2
II. Further Review Is Necessary To Correct The Third Circuit's Erroneous Interpretation of Section 202(h) As Well As Its Failure To Adhere To Basic Principles Of Administrative Law	5
CONCLUSION	10

TABLE OF CITED AUTHORITIES

CASES *Page*

Cellco Partnership v. FCC,
357 F.3d 88 (D.C. Cir. 2004) 6, 7

Department of Transportation v. Public Citizen,
541 U.S. 752 (2004) 2

FCC v. ITT World Communications, Inc.,
466 U.S. 463 (1984) 3

Federal Energy Regulatory Commission v. Pennzoil Producing Co.,
439 U.S. 508 (1979) 3

Fox Television Stations, Inc. v. FCC,
280 F.3d 1027 (D.C. Cir. 2002) 4, 6

NBC v. United States,
319 U.S. 190 (1943) 9

Prometheus Radio Project v. FCC,
373 F.3d 372 (3d Cir. 2004) ..... *passim*

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 1

Sinclair Broadcast Group, Inc. v. FCC,
284 F.3d 148 (D.C. Cir. 2002) 6

South Dakota v. Yankton Sioux Indian Tribe,
522 U.S. 329 (1998) 9

Cited Authorities

Page

United States v. Menasche,
348 U.S. 528 (1955) 9

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 2

UNITED STATES CONSTITUTION

First Amendment 1, 2, 5, 8

FEDERAL STATUTES

Consolidated Appropriations Act, 2004,
Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) ... 3

Telecommunications Act of 1996,
Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996)
..... *passim*

ADMINISTRATIVE MATERIALS

2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R.
13620 (2003) 3, 6, 7

Respondents Federal Communications Commission and United States of America ("FCC") agree with Petitioners that the Third Circuit erred in determining that the Commission had not provided sufficient justification for its cautious and measured relaxation of the limits on media ownership. FCC Opp. 14-15. Nevertheless, the FCC contends that review by this Court of the Third Circuit's derailment of the Congressionally–mandated review and relaxation of long-outdated ownership taboos is not warranted "in the present posture of the case," FCC Opp. 12, and that such review should await completion of open-ended proceedings on remand. The self-styled Public Interest Respondents ("Prometheus") likewise counsel deferral of further review and prefer to maintain, for the indefinite future, antiquated rules, including an absolute ban on newspaper cross-ownership adopted thirty years ago, in a world without 500-channel cable, DBS, or the Internet. Prometheus Opp. 3, 16-17.

It is not surprising that the FCC wishes to avoid further consideration of the implications of the clear-cut deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996), and postpone review by this Court of the unique and extremely limited Constitutional protections that have been accorded broadcasters under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Review by this Court is necessary, however, to prevent the indefinite perpetuation of archaic and discriminatory restrictions on newspaper/broadcast cross-ownership that disserve the American public and to permit the Commission to complete expeditiously the task expressly assigned to it by Congress under the 1996 Act. Moreover, without proper and definitive guidance on the proper statutory and First Amendment framework, the FCC's proceedings on remand may serve only to perpetuate the agency's and the Third Circuit's errors and result in another decision, after years of delay, that fails to satisfy Constitutional requirements or the specifications of Congress.

I. Review By This Court Is Necessary To Provide Clear And Definitive Guidance On The Correct Statutory And Constitutional Framework For Agency Action And Prevent Unnecessary Delay And Further Error On Remand.

In their Petition, the Newspaper Association of America, Belo Corp., Gannett Co., and Morris Communications Company, LLC (collectively "NAA") demonstrated the need for this Court to review the Third Circuit's decision in order to provide the FCC with clarification regarding the legal boundaries of its periodic review obligations and to ensure that the agency is given the flexibility to carry out its statutory obligation to reconcile its media ownership regulations with the realities of the contemporary marketplace. NAA Pet. 17-18, 23. Both Prometheus and the FCC responded in substantial part that the case is currently in an "interlocutory" posture, and that the Court should not review the matter until agency proceedings on remand from the Third Circuit are completed. *See, e.g.*, Prometheus Opp. 2-3; FCC Opp. 12-13.[1]

---

[1] The FCC recites the unremarkable proposition that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." FCC Opp. 12 (citing *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.)). The general practice, however, is inapposite here. The Third Circuit has reached a decision on the rule and record presented to it by the FCC that frustrates Congress's mandate of a timely review process. Further, the broadcast and newspaper industries as well as the American public are now and will continue to be injured by the Third Circuit's directive to maintain the prior cross-ownership ban. Finally, in the interest of efficient remand proceedings, this Court should clarify the proper First Amendment and statutory standards to be applied by the agency.

Prior Supreme Court practice confirms that there is no impediment to the Court's exercise of jurisdiction when a reviewing court remands a matter to an agency. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 762-63 (2004) (granting certiorari in case involving remand to the Department of Transportation to conduct an environmental impact

(Cont'd)

This is not an ordinary case, however, and does not involve a routine rulemaking undertaken at the behest of petitioners or the agency itself. To the contrary, in the 1996 Act, Congress specifically ordered the FCC to conduct a biennial[2] review of its media ownership rules. The Commission is directed to "determine whether any of [these] rules are necessary in the public interest as the result of competition, [and] . . . repeal or modify any regulation it determines to be no longer in the public interest." § 202(h), 1996 Act.

Based on the Commission's extensive factual record and "reasoned analysis," the Third Circuit agreed with "the Commission's determination that a blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), at 40a.[3] In reaching its decision, the court pointed to numerous examples from the record on the benefits of cross-ownership, including a study finding "that newspaper-owned television stations provide almost 50% more local news and public affairs programming than other stations." *Id.* at 41a.

(Cont'd)

statement); *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 467 (1984) (granting certiorari when the court of appeals "found the [FCC's] record 'patently inadequate' to support the FCC's conclusion"); *Fed. Energy Regulatory Comm'n v. Pennzoil Producing Co.*, 439 U.S. 508, 514 (1979) (granting certiorari in a case involving remand to an agency to conduct further proceedings). Notably, in each of the three cited cases, the *government itself* petitioned the Court for review.

[2] Congress continues to require regular evaluations of existing media ownership rules, now every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

[3] The Court of Appeals decision is cited as 1a-190a and is contained in the appendix filed by Media General, Inc. The FCC's 2003 Order, *2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13620 (2003), is cited as 206a-723a.

While the Court of Appeals agreed with the Commission on the public interest harms generated by the absolute cross-ownership ban, it remanded the new, more lenient cross-media rules, *id.* at 11a-12a, and continued to stay their effectiveness. *Id.* at 107a. By maintaining the stay, the court left in effect the very ban that it previously agreed "was no longer in the public interest." *Id.* at 40a.[4] As NAA showed in its Petition, the delay and uncertainty created by this elongated process threatens the financial health of the newspaper and broadcasting industries and undermines the Congressionally-mandated process of reviewing the rules on a regular basis. NAA Pet. 17-18.

The FCC contends that the "old rules were not challenged in this proceeding" and, thus, are not currently at issue. FCC Opp. 13; *see also* Prometheus Opp. 16. The entire focus of the proceedings below, however, was the review and reevaluation of the continued validity of the FCC's prior ownership rules. The Commission concedes that "[h]ad the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate." FCC Opp. 13. By continuing the stay, however, the Court of Appeals has effectively established a cross-ownership rule for the indeterminate future – namely, the longstanding but now-discredited cross-ownership ban. Thus, the Third Circuit's

[4] The Commission has tried unsuccessfully in past cases to raise similar objections to judicial review of changes to its ownership rules. In an earlier biennial review case, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002), the Commission had *left in place* the national 35% cap on television station ownership. Although the FCC asserted that "its decision not to repeal or to modify the Rules [was] not final agency action," *id.* at 1037, the court reached the opposite conclusion: "There is no question a Commission determination not to repeal or to modify a rule . . . is a final agency action subject to judicial review." *Id.* The Third Circuit's determination to displace the FCC's revised rules and continue in effect the agency's prior cross-media ownership ban likewise has concrete and immediate application to affected parties and, therefore, is reviewable at this time.

decision and the continuance of the prior ban would appear to satisfy even the Commission's stated standard for review. Further, in its current posture, this case presents clearly the question of the appropriate level of First Amendment scrutiny in reviewing measures like the newspaper/broadcast cross-ownership ban. NAA Pet. 28-29. Plainly, the unsupported and twice-rejected newspaper prohibition could not withstand strict or intermediate scrutiny. *Even if* rational basis review is appropriate, as urged by Respondents, it is patently irrational to allow a rule that the FCC and Third Circuit have already found to be unjustified to continue in effect for the indeterminate future. *See* NAA Pet. 26-28.

II. Further Review Is Necessary To Correct The Third Circuit's Erroneous Interpretation Of Section 202(h) As Well As Its Failure To Adhere To Basic Principles of Administrative Law.

Contrary to the claims of the FCC and Prometheus, FCC Opp. 24-26; Prometheus Opp. 17-20; FCC Cross-Pet. 19-20 & n.10, review of the Third Circuit's decision concerning the proper interpretation of Section 202(h) is both appropriate and necessary *before* any further proceedings on remand. *See* NAA Pet. 19-23; NAB Pet. 22-25; Clear Channel Br. 20-27. This Court's review is urgently required in order to resolve a conflict in the circuits and to avoid further delaying the repeal or modification of the thirty-year-old newspaper/broadcast cross-ownership ban.

To support their contentions, the FCC and Prometheus focus myopically on isolated portions of the D.C. Circuit's and Third Circuit's decisions regarding the governing legal standard under Section 202(h). But one must do no more than read with minimal care the decision below and the D.C. Circuit's decisions interpreting the FCC's biennial review mandate to grasp the seriousness of the claim that the Third Circuit adopted and applied "essentially the same standard" as the D.C. Circuit. FCC Opp. 26; *see* Prometheus Opp. 18-20. Both circuits may have

alluded to the FCC's obligation to "provide an adequate explanation," FCC Opp. 25 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1042, 1044 (D.C. Cir. 2002)); FCC Cross-Pet. 16-17 (same), as required by the Administrative Procedure Act ("APA") in order to justify the retention of a rule. *See* FCC Cross-Pet. 16-17 (citing *Prometheus* at 34a-36a); Prometheus Opp. 19 (citing *Prometheus* at 31a). That, however, is where any real similarity ends. Although the Court of Appeals paid lip service to the "deregulatory" purpose of the 1996 Act, Prometheus Opp. 18 (citing *Prometheus* at 34a, 122a), the reality is that the Third Circuit gave no effect to that purpose whatsoever. NAA Pet. 20-23.

The D.C. Circuit, by contrast, has not only emphasized the deregulatory purpose of Section 202(h), *see Fox*, 280 F.3d at 1033; *see also Cellco Partnership v. FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004), but has actually *given effect to* that purpose by critically scrutinizing the FCC's other biennial review decisions under Section 202(h). In its Section 202(h) cases, the D.C. Circuit has demanded a detailed justification for the FCC's determination that specific rules should be retained intact and has reversed the Commission's decisions to keep in place several of the rules at issue below. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159, 162-65 (D.C. Cir. 2002); *see also* NAA Pet. 4-6, 18; NAB Opp. 3. The Third Circuit, however, required the FCC to provide additional justification only where it had sought to lessen regulatory burdens on media companies, *see Prometheus* at 102a-106a; upheld the FCC's authority to expand regulations in the course of its biennial review, *id.* at 34a; and, by maintaining its stay of the deregulatory portions of the *2003 Order*, *id.* at 107a, required the continued enforcement of the blanket ban on newspaper/broadcast cross-ownership even though both the agency and the Third Circuit itself agreed that the rule is "no longer in the public interest," *id.* at 107a, 40a; *2003 Order* at 453a. In short, regardless of whether the Third Circuit may have *articulated* a standard that can be likened to that adopted by the

D.C. Circuit, the Third Circuit plainly did not *apply* a standard anything like that applied by the D.C. Circuit.

Further, the FCC and Prometheus disregard the Third Circuit's explicit disagreement with its sister circuit on two issues of critical importance. First, the D.C. Circuit's rulings made clear to the FCC that the biennial review mandate, at a minimum, "upend[s] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *2003 Order* at 215a. The Third Circuit reversed the FCC on this point, finding that the D.C. Circuit's decisions had "misguided" the FCC into believing that Section 202(h) places any burden upon it at all. *Prometheus* at 34a-35a. Second, the D.C. Circuit made clear in *Cellco* that the FCC's biennial review duties "extend[] beyond [the FCC's] normal monitoring responsibilities" under the APA. 357 F.3d at 99; *see* NAA Pet. 22-23; Clear Channel Br. 25-26.[5] The Third Circuit held, instead, that the biennial review adds nothing at all to what the agency must do in the ordinary course to avoid arbitrary and capricious decision-making under the APA. *See Prometheus* at 34a (holding that Section 202(h) was deregulatory only insofar as it "requires the [FCC] periodically to justify its existing regulations"); NAA Pet. 22-23 (explaining that the FCC already has such an obligation under ordinary principles of administrative law).

Finally, even if there were no disagreement between the two circuits regarding the proper interpretation of Section 202(h), that would not justify denial of NAA's petition. To the contrary, this case presents questions of critical national

[5] Prometheus mischaracterizes this portion of the *Cellco* opinion as dealing only with remedies by focusing on the single sentence that preceded the D.C. Circuit's statement. Prometheus Opp. 20. That sentence, however, was part of the summary paragraph explaining the circuit court's entire rationale. *Cellco*, 357 F.3d at 97. Moreover, the inclusion of Section 202(h) within the broader and explicit deregulatory framework of Section 202 contrasts with the separate provision at issue in *Cellco*.

importance involving the structure of our nation's media marketplace and the standard under which the FCC may review its rules governing that structure, and warrants review for these reasons alone. NAA Pet. 17-18.[6]

Indeed, contrary to the FCC's suggestion, this case presents far more than "the factbound question whether the Commission adequately provided sufficient justifications for its new rules." FCC Opp. 15; *cf.* Prometheus Opp. 3. The adequacy of the FCC's justifications for its proposed regulations cannot be assessed properly without taking into account the peculiar characteristics of the Congressionally-mandated review process as well as the governing First Amendment standards for agency action in this area. In that light, it is abundantly clear that the Court of Appeals erred in setting aside the FCC's deregulatory initiatives.[7]

As NAA demonstrated in its Petition, the Third Circuit erred in both its interpretation of the governing legal standard under Section 202(h) and its application of that standard to the FCC's limited attempt to temper the outdated newspaper/broadcast cross-ownership ban. NAA Pet. 19-23. By interpreting the statute in a manner that stripped the biennial review mandate of any

---

[6] This Court on numerous occasions has granted certiorari to review FCC orders relating to media ownership rules and provisions of the 1996 Act, even in the absence of a circuit split. *See* NAB Pet. 16-17 (citing authorities); Clear Channel Br. 13-15 (same).

[7] As NAA demonstrated, and as the FCC as well as Chief Judge Scirica in his dissent agreed, the Court of Appeals majority plainly erred in substituting its judgment for the expert agency's determination to provide limited and necessary relief from the cross-ownership ban. NAA Pet. 23-25; FCC Cross-Pet. 21-28; *Prometheus* at 125a-26a (Scirica, C.J., dissenting). Prometheus's endorsement of the Third Circuit's approach, Prometheus Opp. 22-23, suffers from the same failure to appreciate the inherently subjective nature of any diversity analysis and the need for reasonable flexibility in agency line-drawing exercises. *See* NAA Pet. 23-25.

meaning at all, the panel below ignored the Act's language, structure, context, and legislative history. *Id.* Section 202(h) does not stand alone, but was part of Congress's broader and decidedly deregulatory program for media ownership in the 1996 Act. *See id.* 19-20; NAB Pet. 16, 22-25; Clear Channel Br. 21-22.

This Court has long held that statutes must be read "to give effect, if possible, to every clause and word" and to avoid "emasculat[ing] an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations marks and citation omitted). The conflation of the specific biennial review standard with the general APA standard that governs *all* agency determinations – which the FCC and Prometheus urge this Court to effectively sanction by allowing the decision to stand – also violates the canon of construction that a "specific" statutory enactment "governs [a] general" one. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) (internal quotation marks and citation omitted).

* * *

In short, the Third Circuit's decision to remand the new cross-media limits and require continued compliance with the discredited absolute ban on newspaper/broadcast cross-ownership necessitates review by this Court. Under the panel's own decision, *Prometheus* at 33a-34a, the precedents of the D.C. Circuit, any reasonable reading of Section 202(h), and settled principles of administrative law,[8] a rule that has been found to be unjustified by both the relevant agency and the reviewing court cannot be retained. *Cf.* FCC Opp. 26; Prometheus Opp. 20. Absent this Court's review and correction, the Third Circuit's legal errors will necessarily taint the FCC's proceedings on

---

[8] *See* NAA Pet. 22 ("[T]he FCC cannot rest on a rule if 'time and changing circumstances reveal that the public interest is not served by [its] application.'") (quoting *NBC v. United States*, 319 U.S. 190, 225 (1943) (internal quotation marks omitted)); *see also id.* (citing additional authorities).

remand. *See* NAA Pet. 17; Clear Channel Br. 15. Moreover, absent further review, the lower court's retention of jurisdiction over this case will leave that court as the sole arbiter of controversies surrounding the FCC's biennial review of the rules governing the nation's media marketplace and inevitably frustrate the agency's effort to achieve the deregulatory result intended by Congress.

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD E. WILEY
Counsel of Record
JAMES R. BAYES
HELGI C. WALKER
MARTHA E. HELLER
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Newspaper Association of America, Belo Corp., Gannett, Co., Inc., and Morris Communications Company, LLC

May 12, 2005